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## ARIZONA ATTORNEY GENERAL

Opinion 63-38

R-383

November 4, 1963

REQUESTED BY: The Honorable RICHARD J. RILEY  
Cochise County Attorney

OPINION BY: ROBERT W. PICKRELL  
The Attorney General

QUESTIONS: (1) Where a member of a six man Common Council of a Municipal Corporation at a regular meeting of the Council on August 27, 1963, announced his resignation therefrom effective August 28, 1963, and upon motion thereafter duly made and carried, his resignation was accepted, was the appointment by the Council of a successor at that meeting legal?

(2) If question number 1 is answered "Yes", was it legal for the member whose resignation was tendered and accepted to vote upon the motion naming his successor in office?

(3) If the vote of the member whose resignation was accepted was necessary for the appointment of his successor in office, was the successor legally appointed (assuming that he was otherwise qualified to hold office)?

ANSWERS: (1) Yes  
(2) Yes  
(3) Yes

No prior Opinions of the Arizona Supreme Court nor of the Attorney General have dealt with these precise facts. It is initially noted that pursuant to A.R.S. §9-235, the Common Council of a town shall fill by appointment for the unexpired term a vacancy thereon that may occur through resignation of a member of the Council. The member appointed must of course be otherwise legally qualified.

The Arizona Constitution Article 22, Section 13, provides:

"The term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify."

A Common Council member is elected pursuant to Title 9, Chapter 2, Article 3, Arizona Revised Statutes and as such is doubtless an officer within the meaning of the foregoing constitutional provision (See also A.R.S. §38-101).

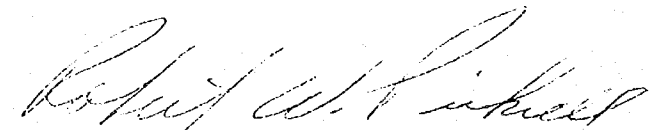
Upon the facts stated, we are of the opinion that the member who resigned lawfully continued in office throughout the balance of the meeting held on August 27, 1963, because; (a) his resignation was tendered effective August 28, 1963, and was apparently accepted as such by the Council; and, (b) a public officer as above defined does not cease to be such when his resignation is accepted but continues until his successor is qualified. Cragin vs. Frohmler, 43 Ariz. 251, 30 P. 2d 247 (1934).

Since the Council member, as a public officer, continued in office until his successor was qualified it follows that he had a right to exercise the prerogatives of his office including voting upon a successor.

Following the appointment of a successor in office by vote of the Council, including the vote of the resigning member, the latter would remain in office until the effective date of the resignation, at which time the successor would properly enter upon his duties.

Though the vote of the resigning Council member was necessary for the passage of the motion appointing the successor, the proceeding is nevertheless legal. No pecuniary conflict of interest is present under these facts and the member was not thereby disqualified.

Accordingly, it is the opinion of this office that the various proceedings described were lawful.



ROBERT W. PICKRELL  
The Attorney General

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## ARIZONA ATTORNEY GENERAL

N. WARNER LEE, THE ATTORNEY GENERAL  
STATE CAPITOL  
PHOENIX, ARIZONA

August 16, 1974

DEPARTMENT OF LAW OPINION NO. 74-16 (R-33)

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REQUESTED BY: THE HONORABLE WILLIAM A. COFFEEN  
Greenlee County Attorney

- QUESTIONS:
1. When a member of a town council tenders a resignation effective in the future, may the council vote for his or her successor prior to the effective date of resignation?
  2. If the answer to Question 1 is "yes", may the resigning member of the town council vote for his or her successor?

- ANSWERS:
1. No.
  2. No.

Attorney General Opinion No. 63-38 held that when a member of the common council of a municipal corporation announced at a regular meeting of the council on August 27, 1963, his resignation effective August 28, 1963, it was proper for the council to appoint his successor on August 27, 1963; that it was legal for the resigning member to vote upon a successor; and that it was legal even though the vote of the resigning member was necessary for the appointment of his successor.

Upon re-examining the opinion, it is the opinion of this office that Attorney General Opinion No. 63-38 was erroneous and, therefore, it is expressly overruled herein.

The previous opinion written by our office relied on the case of Cragin v. Frohmiller, 43 Ariz. 251, 30 P.2d 247 (1934). That particular case involved a tendered resignation of a member of the Colorado River Commission who resigned effective August 12, 1933; the Governor having immediately accepted the resignation. A successor was appointed on November 8, 1933, who qualified on November 17, 1933. The former member of the Commission sought payment for professional services and expenses rendered to the Commission from August 14, 1933, to October 29, 1933.

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(R-33)  
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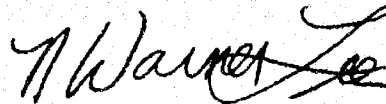
We do not consider that case pertinent to the facts involved herein. The Supreme Court in that case indicated a public officer continues to discharge his duties until a successor qualifies. Therefore, the resigned member was precluded from claiming professional services and expenses while still a member of the Commission, as a successor had not been appointed. The case did not involve a resigning elective officer voting upon his successor.

In McCall v. Cull, 51 Ariz. 237, 75 P.2d 696 (1938), our Supreme Court cited a North Dakota case, which stated:

" . . . A 'vacancy in office', within the meaning of the law, can never exist when an incumbent of the office is lawfully there, and is in the actual discharge of official duty. . . ." (State v. Boucher, 3 N.D. 389, 56 N.W. 142, 145, 21 L.R.A. 539.)

It is the opinion of this office that a vacancy does not exist until the effective date of resignation. Therefore, a vote cannot be taken for that position until the effective date of resignation. Furthermore, the resigning member cannot vote for his successor because a vacancy does not occur in his office until he or she is no longer a member of the town council. This is true whether or not his or her vote would be necessary to select a successor.

Respectfully submitted,



N. WARNER LEE  
The Attorney General

NWL:FS:lf